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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1957**

No. 93

HENRY T. McKINNEY,

*Petitioner,*

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, AS AMICUS CURIAE

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Dated at Toledo, Ohio this 24th day of October, 1957.

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## BRIEF OF RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, AS AMICUS CURIAE

### Preliminary Statement — Interest of the Amicus Curiae.

The Railway Employes' Department, AFL-CIO, on whose behalf as *amicus curiae* this brief is filed, is composed of the following standard national and international railway labor organizations representing, for purposes of collective bargaining under the Railway Labor Act, the so-called shop-craft employees of the great majority of railroads in the United States:

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
Brotherhood Railway Carmen of America
International Brotherhood of Electrical Workers
International Association of Machinists
Sheet Metal Workers' International Association
International Brotherhood of Firemen, Oilers,

Helpers, Roundhouse and Railway Shop Laborers

Collective bargaining for these organizations is conducted on a federated basis by said Railway Employes' Department operating through "System Federations" on the properties of the respective carriers, agreements negotiated by such System Federations providing, among other things, for seniority systems and seniority rights of employees in the various crafts represented. In the fulfillment of its representative function the Railway Employes' Department and its System Federations are under a statutory duty to exert every reasonable effort to make and maintain such agreements and to settle all disputes with respect to their interpretation or application.

Since the enactment of the Selective Training and Service Act of 1940 and subsequent legislation establishing legally enforceable reemployment rights for persons called from private employment to perform military service, numerous questions have arisen, and a great amount of litigation has ensued, with respect to the particular job status and seniority rights to which the returning veteran is entitled. Such questions have been of particular importance in the railroad industry, with its organzation of employees in separate crafts and classes, and confinement of seniority rights to crafts and sub-crafts, and particular points of employment.

Particularly fruitful of continuing litigation have been the claims of returning veterans to be promoted or transferred to positions different from those which they left to enter the armed forces, in either the same or different crafts, and to retroactive or antedated seniority in the new positions following such promotions or transfers. Such claims, and the continuing litigation, necessarily give rise to uncertainty and insecurity, not to mention dissension, within the employee groups affected, and this situation can

only be alleviated by the development of well established principles governing the application of the statutory reemployment provisions to these questionable situations.

In a number of cases in whch it has participated, the Railway Employes' Department has taken the view that while the returning veteran must be restored to his former position with full accumulation of seniority credit for the period of his absence in the armed forces, the statutory provisions did not require his restoration to a new or different position, with retroactive seniorty therein, simply on the theory that he could, would, or might have been able to obtain such position had he not been absent. Such view was followed by the lower Federal courts with almost complete unanimity until this Court's *per curiam* reversal of the decision of the Court of Appeals for the Third Circuit in *Diehl v. Lehigh Valley R. Co.*, 348 U.S. 960. Though we do not agree that it warrants such construction, the *Diehl* decision has been interpreted by Government counsel representing the returned veterans as a reversal of this previous line of cases, and a resurgence of litigation on this question has followed, with resultant conflicting decisions of the courts.

While opposed to the broad scope thus sought to be attached to the *Diehl* decision, the Railway Employes' Department, as collective bargaining representative of both veteran and non-veteran railroad employees, is equally interested in having these issues authoritatively decided. The present case presents both the occasion and the opportunity for this Court to do so.

Of some additional concern is the question raised here with respect to the right of the returning veteran in the railroad industry to submit his grievances to the Federal courts without resort to the National Railroad Adjustment

Board, and a portion of our discussion will be directed to that point.

## Summary of Argument

While the Universal Military Training and Service Act of 1951 requires the returning veteran to be restored to his former position without loss of seniority, it does not require his retroactive restoration to a new or different position, in a completely separate and distinct seniority category, on the theory that he would or might have obtained such position had he not been absent. The statutory requirement of restoration "without loss of seniority" requires accumulation of seniority credit during the period of miltary service, but such accumulation applies only to the position which the veteran left and to which he is required to be restored. And irrespective of any question of the veteran's right to a retroactive reconstruction of a progression of job transfers or promotions which he might have had a contract right to pursue had he not been absent, it is clear that he has no legally enforceable claim to different or better positions which he might or even probably would have been awarded, at the discretion of his employer, such claims resting in the realm of speculation rather than legal right.

Disputed questions of the interpretation and application of collective bargaining agreements in the railroad industry rest within the exclusive jurisdiction of the National Railroad Adjustment Board, and that jurisdiction was not impaired by the Selective Training and Service Act of 1940 and ensuing statutes creating veterans' reemployment rights. Status as a veteran does not give a railroad employee the right to by-pass the National Railroad Adjustment Board and resort initially to the courts for determination of a claim based upon disputed questions of interpretation or application of collective bargaining agreements.

## ARGUMENT

### I. THE STATUTE DOES NOT REQUIRE RESTORATION TO A PROMOTED POSITION IN A SEPARATE AND DISTINCT SENIORITY CATEGORY SIMPLY BECAUSE THE VETERAN MIGHT HAVE ACHIEVED IT HAD HE NOT BEEN ABSENT IN MILITARY SERVICE.

The Universal Military Training and Service Act of 1951 (65 Stat. 75, U.S.C. App., Sec. 451 et seq.), the statute upon which this action is based, requires that in the case of a veteran who left a position, other than temporary, in the employ of a private employer, he shall be restored "*to such position* or to a position of like seniority, status and pay". (Sec. 9 (b) (B) (i); emphasis supplied.) It is further provided that any person who is restored to a position pursuant to the foregoing provisions "shall be considered as having been on furlough or leave of absence" and "shall be so restored without loss of seniority". (Sec. 9 (c) (1).) The same provisions were contained in the Selective Training and Service Act of 1940 (50 U.S.C. App., Sec. 301 et seq.), and the subsequently enacted statutes conferring reemployment rights upon veterans.

Petitioner in the instant case left, and was restored to a position as a Group 2 Clerk, and was given accumulated seniority credit in that position for the period of his absence. Immediately following his reemployment, however, he obtained a position as a Group 1 Clerk, in a completely separate and distinct seniority category from the Group 2 classification, and the purpose of the suit is to require that he be given retroactive or antedated seniority status in Group 1 corresponding to that which he says he would have obtained had he not been absent in military service.

The parties here are in dispute as to whether, under the applicable collective bargaining agreements, petitioner

would certainly have achieved the Group 1 position as a matter of contract right, or might have achieved it as a matter of probability only (which was the view of the Court of Appeals below, 240 F. (2d) 8). In the view we take of the statute, we think that under either circumstance the petitioner must fail; but that in any event no legally enforceable rights such as those here asserted may be based upon "probabilities", requiring speculation as to what would or might have been.

### (a) Authorities Prior to Diehl Decision.

The position taken by the petitioner is not novel. Similar contentions were urged under the 1940 and subsequent statutes, and were rejected by the courts in almost every instance prior to this Court's decision in *Diehl v. Lehigh Valley R. Co.*, 348 U.S. 960.

Many of these decisions have been cited and discussed at length in the briefs of the parties herein, and we shall not burden the Court with any lengthy analysis of the authorities. Those cases involved various claims for promotions, vacation rights, higher positions on step-rate pay scales, and other benefits which the veteran said he would or could have obtained had he not been absent, but which he could not obtain as rights and incidents of his old position, even with full accumulated seniority credit for the period of his military service.

For purposes of this case, however, it should be pointed out that the decisions may be divided into two categories, i.e., (1) those cases where the claimed status would have been achieved automatically or as a matter of contractual right, and (2) those in which the veteran could show at most a "high probability" that he would have achieved the sought-for status.

Illustrative of the first category are the following cases:

*Bostian v. Seaboard Airline R. Co.*, 211 F. (2d) 867 (C.A. 4).

*Spearmon v. Thompson*, 167 F. (2d) 626 (C.A. 8); cert. den., *sub nom. Delozier v. Thompson*, 355 U.S. 886.

*Seattle Star, Inc., v. Randolph*, 168 F. (2d) 274 (C.A. 9).

*Trischler v. Universal Potteries, Inc.*, 171 F. (2d) 707 (C.A. 6), affirming 78 F. Supp. 609.

*Addison v. Tennessee Coal, Iron & R. Co.*, 204 F. (2d) 340 (C.A. 5).

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*Brown v. Watt Car & Wheel Co.*, 182 F. (2d) 570 (C.A. 6), cert. den. 340 U.S. 875.

*Dougherty v. General Motors Corp.*, 176 F. (2d) 561 (C.A. 3), cert. den. 338 U.S. 956.

*Foster v. General Motors Corp.*, 191 F. (2d) 907 (C.A. 7), cert. den. 343 U.S. 906, rehearing den. 343 U.S. 937.

*Dwyer v. Crosby Co.*, 167 F. (2d) 267 (C.A. 2).

*Siaskiewicz v. General Motors Corp.*, 166 F. (2d) 463 (C.A. 2).

In the second category, the "high probability" cases, are the following:

*Hewitt v. System Federation No. 152 etc.*, 161 F. (2d) 545 (C.A. 7).

*Lesher v. P. R. Mallory & Co.*, 166 F. (2d) 983 (C.A. 7).

*Gregory v. Louisville & N. R. Co.*, 191 F. (2d) 856 (C.A. 6), cert. den. 343 U.S. 903.

*Raulins v. Memphis Union Station Co.*, 168 F. (2d) 466 (C.A. 6).

*Rose v. Texas & N.O.R. Co.*, 171 F. (2d) 458 (C.A. 5).

In most of the cases cited above, the courts had recognized the appropriateness of the so-called "escalator principle" (*Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275), or "continuous employment" test (*Oakley v. Louisville & N.R. Co.*, 338 U.S. 278), as descriptive of the veteran's right to continue to accumulate seniority during his military absence (even though applicable agreements might call for interruption of seniority credit during furlough or leave of absence). But the decisions confined such right to seniority in the position, or seniority category, which the veteran had left and to which the statute required him to be restored.

**(b) The Diehl Case.**

It is the claim of the petitioner that all of the foregoing authorities, whether falling in the contract right or high probability category, and whether involving seniority rights, promotions, vacation pay eligibility, step-rate pay systems, or other employment benefits, have in effect been overruled by this Court's decision in *Diehl v. Lehigh Valley R. Co.*, 348 U.S. 960. (See petitioner's brief, p. 20, note 11, enumerating cases said to be "irreconcilable" with the *Diehl* case.) If that is true, then we can think of no other instance in which such a large body of authority has been reversed without explanation or statement of controlling principles, by a one-sentence opinion expressly predicated on the facts of the particular case, and where those facts were completely different from those of the cases said to have been reversed.

However we do not subscribe to the principle that the

cases cited are thus "irreconcilable" with the *Diehl* decision. Indeed, consideration of the facts of the *Diehl* case will show the complete lack of controlling effect upon the questions here presented.

Diehl, like the three successful plaintiffs in the *Spearmon* case, *supra*, had already been promoted prior to entering the armed forces. Continuous employment in the position he left to enter the armed forces, and to which he was restored, would have resulted in the seniorty status sought by Diehl, so that it may be said that the case in effect simply involved a denial of his right to continue to accumulate seniority during his absence, and to be restored "without loss of seniority" upon his return. No *retroactive* seniority, in a different position and seniority category than that in which he had previously been employed, was involved in the *Diehl* case. And, of importance with reference to the instant case, no speculative factual elements were involved in determining what Diehl's seniority would have been had he not been absent. Diehl was already on the seniority "escalator" involved, when he entered the armed forces (even though definition of its contractual attributes was deferred until long after his return and reemployment).

A searching analysis of the *Diehl* decision with precise reference to the very issues involved here, appears in the article by Professor Herbert L. Sherman, Jr., entitled "Seniority and Promotion Rights of Reemployed Veterans" at 17 Pitt. L. Rev. pp. 20-41 (1955). Because we believe that article, *in toto*, to be completely meritorious of the Court's attention in connection wth the disposition of this case, we shall not attempt paraphrasing or synopsis of the entire discussion here. A few short quotations from the article will, however, serve to demonstrate its relevance.

After detailed discussion of the facts of the *Diehl* case and the arguments presented to the Court, Professor Sherman says:

"It is not surprising, therefore, that the Supreme Court found it possible to dismiss this case in a brief per curiam decision. But what did it actually hold? Simply that a veteran is entitled to count military service toward his seniority credit, where the seniority ranking of incumbents of the job to which the returning veteran is restored is dependent upon routine completion of a certain number of work-days, so that his position on the 'seniority escalator' will not suffer because of service in the armed forces. Once the case is considered as presenting only that narrow issue, the result is easy under the *Fishgold* and *Oakley* cases. (pp. 27-28.)

. . . . .

"Insofar as the Supreme Court merely applies its 'continuous employment' standard to the question of measuring the seniority credit of a veteran, it is simply and properly giving greater weight to the more specific Congressional language ('without loss of seniority') than if is to the more general statutory language ('shall be considered as having been on furlough or leave of absence'). If there is any conflict between these two provisions, the Court, under well-accepted principles of statutory construction, must consider the more specific provision as controlling." (P. 29.)

. . . . .

"In areas other than seniority credit and automatically attendant benefits, the 'furlough or leave of absence' provisions should be considered as part of the 'continuous employment' standard. It would seem clear that an employee may remain continuously in the employment of his employer, yet be on furlough or leave of absence. The concepts are not inconsistent. Where questions other than arithmetical calculation of seniority credit or automatic layoffs and promotions based solely on length of service are involved, the courts may properly consider the furlough or leave of absence provisions of the employer as a basis for denying benefits claimed by the veteran. . . ." (pp. 29-30.)

Further discussing the specific questions involved in

this case, Professor Sherman refers to the principles developed in the *Bostian, Addison,* and *Raulins* cases, cited above, and *Special Service Company v. Delaney,* 172 F. (2d) 16 (C.A. 5), and concludes that "Certainly, the *Diehl* case, which did not require any ruling on the question of a right to a promotion to a different and higher job, cannot be said to overrule these principles." (pp. 31-33.)

Although the *Diehl* case is thus completely distinguishable from the instant one, on both its factual situation and the controlling statutory provisions, the Government's sweeping claims as to its import have resulted in conflicting decisions in subsequent cases. Here the court below in effect adopted the viewpoint espoused by Professor Sherman. The Court of Appeals for the Fifth Circuit, in *Poore v. Louisville and Nashville Railroad Company,* 235 F. (2d) 687, seemed also to have done so; but then, in *Moe v. Eastern Air Lines, Inc.,* 246 F. (2d) 215 (petition for certiorari pending before this Court, No. 419, October term, 1957), seemed to take the opposite view. The Court of Appeals for the Sixth Circuit, in *Mann v. Crowell-Collier Publishing Co.,* 239 F. (2d) 699, appears to have considered its previous line of decisions reversed by the *Diehl* case. But the *Diehl* case was distinguished, and the previous line of authorities adhered to, in *Sularz v. Minneapolis, St. P. & S.S. M.R.R.,* 148 F. Supp. 83 (D.C. Minn., 1956).

While of the view that the previous authorities which we have cited need not be considered as reversed by the *Diehl* case, and that the decision of the court below should be affirmed, we believe that it is of vital importance that this confused state of the authorities be clarified, and the *Diehl* decision placed in its proper perspective.

**(c) Lack of Support for Petitioner's Claim in the Statute or its Legislative History.**

While, as has been pointed out, the Act requires restoration of the veteran to his former position, or one of like seniority, status and pay without loss of seniority, and while these provisions have been construed to require accumulation of seniority credit as if the veteran had been continuously employed, irrespective of any agreement provisions conditioning accrual of seniority upon presence on the job, there is no language in the statute which purports to give the returning veteran rights in a position and seniority category completely separate and distinct from that which he left to enter the armed forces.

While petitioner invokes Section 9 (c) (2) of the Universal Military Training and Service Act as a Congressional endorsement of his position, quite the contrary is true.

While the other portions of Section 9 are substantially a carry-over from the language of Section 8 of the Selective Training and Service Act of 1940, as amended (50 U.S.C. App., Sec. 301 et seq.), paragraph 9 (c) (2) was added at the time of adoption of the Selective Service Act of 1948 (62 Stat. 604, 50 U.S.C. App., Sec. 451, et seq.), the immediate precursor of the present statute. The legislative history of this addition is enlightening.

When the 1948 Act was under consideration, the following language embodied in H.R. 6401, 80th Congress, 2nd Session, was proposed to be included in order to entitle returning veterans to be restored not just to their "former positions," as in the 1940 Act, but to other and different positions to which they might have been promoted had they not been absent:

> "Sec. 8 (d) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) or of subsection (c) shall be considered as having been on furlough or leave of absence during his period of service in the armed

forces, *shall be entitled to all promotions*; increases in pay, vacation rights not otherwise regulated by law, and accumulations of seniority to *which he would have been entitled had he been working for the employer during his period of service in the armed forces.* (Emphasis supplied.)

Congress did not include the above quoted language in the Act as finally adopted, but instead adopted the following provision:

"(2) *It is hereby declared to be the sense of the Congress* that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *should* be restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." (Selective Service Act of 1948, Section 9 (c) 2; emphasis supplied. This language remains unchanged in the present Act.)

That the language last quoted above was intended to be *precatory* and not mandatory is clearly indicated by a reading of the following provisions of Section 9 (b) of the 1948 Act imposing mandatory obligations to reemploy veterans upon (A) the United States Government and its political subdivisions and (B) upon private employers, but providing only for a "precatory" or suggested treatment of veterans who left the employment of (C) any state or political subdivision thereof:

"(A) if such a position was in the employ of the United States Government, its Territories, or possessions, or political subdivisions thereof, or the District of Columbia; such person *shall* * * * be restored to such position * * *.

"(B) if such position was in the employ of a private employer, such person *shall* * * * be restored * * * to such position * * *.

"(C) if such position was in the employ of any State or political subdivision thereof, it is hereby *declared to be the sense of the Congress* that such person *should* * * * be restored to such position * * *". (Emphasis supplied.)[1]

Furthermore, it should be noted that in Section 9 (d) of both the 1948 and present Acts, providing for court action to enforce the obligations of the statute, no provision is made for enforcement of Section 9 (c) (2), the precatory "sense of Congress" clause. Paragraph (d) reads in part as follows:

"(d) In case any private employer fails or refuses to comply with the provisions of subsection (b) *or subsection (c) (1)*, the district court * * * shall have the power * * * to require such employer to comply with such provisions. * * *." (Emphasis supplied.)

We submit that the rejection by Congress of a proposal for the express granting of the rights here asserted by appellant, the substitution therefor of language which on its face does not require such treatment of veterans, and the provision for enforcement of Sections 9 (b) and 9 (c) (1) *but not* 9 (c) (2), all clearly demonstrate that Congress did not wish to create any such rights as appellant asserts in a legal, or mandatory, sense, but was content with the state-

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[1]The quoted "sense of the Congress" language is identical with that appearing in Section 8 (b) (C) of the 1940 Act. See *Rutherford v. City of Nashville*, Tenn. Ct. of Appeals, March 27, 1948, 21 L.R.R.M. 2618, 14 Labor Cases (C.C.H.) No. 64,413, and *McLaughlin v. Retherford*, 207 Ark. 1094, 184 S.W. 2d 461 (Ark. Sup. Ct., Dec. 18, 1944), holding that employees of states or political subdivisions thereof possess no reemployment rights under the Federal statute. That the present Act "contains no mandatory provisions covering such employees" is conceded in the question and answer "Reemployment Rights Handbook", October, 1954, prepared by the Bureau of Veterans' Reemployment Rights in cooperation with the Office of the Solicitor, United States Department of Labor, Washington, D.C. (See Question No. 28, p. 18.)

ment of a policy the application of which it desired but did not require.[2]

In view of the language of the statute and its legislative background, it becomes apparent that litigation such as this simply constitutes an attempt to obtain from the courts, under the guise of statutory interpretation, something which Congress has expressly refused to grant.

### (d) Unenforceability of Speculative Claims based on "High Probability" of Promotion.

Although there appears to be some disagreement among the parties to this case as to whether petitioner could have asserted a contractual right to demand and receive the Class 1 Clerk's position which is the subject of this litigation, the court below found that no such right existed, and it appears to us that the case falls within the category of so-called "high probability" cases. Whatever else the *Diehl* case may be claimed to stand for, it does not support a speculative claim of this sort.

The high probability type of claim originated with the case of *Hewitt v. Chicago, South Shore and South Bend Railroad Company*, decided July 23, 1946, by the United States District Court for the Northern District of Indiana, and unofficially reported at 18 L.R.R.M. 2262. In that case the returning veteran who had been a car cleaner claimed the right to a position as carman helper, with retroactive seniority to the time when he claimed he would have received the promotion had he not been in the armed forces. The District Court found that although car cleaners had no contractual right to such promotions in order of their car

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[2] A similar conclusion is reached by Professor Sherman, in the law review article noted above, after a more detailed analysis of the effect of Section 9 (c) (2).

cleaner seniority, Hewitt's claim should be sustained on the ground that there was a "high probability" of his having been promoted in seniority order had he not been in the armed forces. The following excerpt from the court's oral opinion illustrates the reasoning which was applied:

> "If it is in the speculation area, I should rule against Hewitt; if it is a matter of certainty, I should rule for him. But the problem is not that easy. It seems to me the evidence lends itself to a high probability that he would have been promoted to the job of car helper on that date." (18 L.R.R.M: 2263.)

On April 29, 1947, this holding was reversed by the Court of Appeals for the Seventh Circuit, in the case of *Hewitt v. System Federation No.* 152, *etc.*, 161 F. (2d) 545. Since that time the courts in numerous cases have uniformly rejected the "high probability" claims of returning veterans. A few of these cases were noted above in our citation of authorities prior to the *Diehl* decision. Insofar as we are aware, the only previous instance in which a review by this Court was sought in such a case was in *Gregory v. Louisville & N. R. Co.*, 191 F. (2d) 856 (C.A. 6); cert. den. 343 U.S. 903. There would thus appear to be complete uniformity among the federal courts since the decision in the *Hewitt* case, *supra*.

We submit that complete chaos would result if the processes of litigation and adjudication were to be extended to such matters as the degree of probability of an employee's having been selected for promotion in the exercise of managerial discretion at some past time, and his merit, ability and qualifications, relative to those of his fellow employees, in the eyes of the management representatives who would have been called upon to exercise such discretion. Such matters, as the courts have found, rest within the realm of speculation, not decision, and cannot give rise to legally enforceable rights.

## II. EXCLUSIVE JURISDICTION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD OVER INTERPRETATION AND APPLICATION OF RAILROAD COLLECTIVE BARGAINING AGREEMENTS.

As an additional ground for affirmance of the decision below, the respondent Brotherhood has urged lack of jurisdiction of the District Court by virtue of the National Railroad Adjustment Board's exclusive jurisdiction over the subject matter of the case. While, as indicated above, we do not believe that decision of this question is necessary to an affirmance of the decision below, the question raised is of such obvious concern to the Railway Employes' Department that its position should not go unstated.

Without attempting to inject ourselves into the merits of the claims of the parties herein, on the question of this petitioner's rights under the particular collective bargaining agreements involved, we submit that it is indeed well established, since this Court's decision in *Slocum v. D.L. & W.R.R. Company*, 339 U.S. 239, that the Adjustment Board possesses exclusive jurisdiction over the interpretation and application of collective bargaining agreements in the railroad industry. The final and binding nature of the Board's determination of such matters was further pointed up in *Brotherhood of R.T. v. Chicago R. & I. R. Co.*, ..... U.S. ...., 1 L. Ed. (2d) 622, where the Board proceedings were classified as statutory compulsory arbitration.

The statutes creating veterans' reemployment rights did not purport to rewrite collective bargaining agreements, or to create contractual employment rights, but rather were designed to restore the veteran to his rights under existing contracts. As this Court observed in the *Fishgold* case, *supra*, there is no suggestion that Congress intended to sweep aside existing seniority systems; instead it gave the veteran protection within their framework. We submit that it follows that neither did Congress intend to inter-

fere with the exclusive machinery it had previously established to settle disputes over the interpretation of the collective agreements.

Accordingly, it seems clear that where a railroad employee who happens to be a veteran wishes to prosecute a claim based upon the agreements governing his craft, the Board's jurisdiction is exclusive.

This is not to say that a veteran's claim based upon an alleged violation of the Universal Military Training and Service Act, and asserting benefits by virtue of that Act rather than under an agreement, is not properly presented to the courts.

But finally, where the claim, though based on the Act, must stand or fall on a disputed question of contract interpretation, it would seem that the court should at the least hold the case in abeyance pending submission of the dispute over contract interpretation to the Adjustment Board, and should thereafter apply the Act in the light of that interpretation. (*Order of Railway Conductors v. Pitney*, 326 U.S. 561.)

## CONCLUSION

Petitioner's claim is unsupported by either the language or the legislative history of the statute on which it is based, and similar claims were rejected by the great weight of the authorities prior to this Court's decision in the *Diehl* case. Though completely distinguishable on its facts, and involving application of different statutory requirements, sweeping claims as to the scope of the *Diehl* decision have resulted in conflicting interpretations of the law governing veterans' reemployment rights. We have pointed out the importance of having these conflicts resolved, and the present case affords the occasion and opportunity to do so.

We have further shown the lack of merit in the attempted legal enforcement of claims resting in the category of probabilities rather than contractual rights, and the confusion that would attend extension of the processes of litigation and adjudication to such speculative matters.

And finally, we have pointed out that the veterans' reemployment statutes were not designed to impair the exclusive jurisdiction of the National Railroad Adjustment Board over the interpretation and application of collective bargaining agreements in the railroad industry, or to open the courts to claims based upon such agreements merely because of the employee's status as a veteran.

Respectfully submitted,

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Dated at Toledo, Ohio this 24th day of October, 1957.

## CERTIFICATE OF SERVICE

I, Richard R. Lyman, one of the attorneys for the Railway Employes' Department, AFL-CIO, amicus curiae, do hereby certify that on the .... day of October, 1957, I served the attached brief of amicus curiae upon all parties of record herein by depositing copies hereof in the United States mails, via airmail, postage prepaid, addressed to J. Lee Rankin, Esq., Solicitor General; George Cochran Doub, Esq., Assistant Attorney General; Samuel D. Slade, Esq., and John G. Laughlin, Jr., Esq., Department of Justice, Washington (25) D.C., attorneys for petitioner; Wayne R. Howell, Esq., M. E. Clinton, Esq., and Dan M. Welch, Esq., Barrett Building, Denison, Texas, attorneys for Respondent Missouri-Kansas-Texas Railroad Company; and to Sam Elson, Esq., Carroll J. Donohue, Esq., attorneys for Respondent Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 506 Olive Street, St. Louis 1, Missouri.

Richard R. Lyman